

CAMPUS SEXUAL ASSAULT AND DUE PROCESS

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INTRODUCTION

College women experience rape and sexual assault at alarmingly high rates.¹ One highly publicized statistic, famously asserted by President Obama,² states that one in five women experience sexual assault while attending college.³ In 2011, the U.S. Department of Education radically expanded its involvement in campus sexual misconduct adjudications, encouraging vigorous enforcement. Sustained regulatory and public pressure effectuated some positive change for victims.⁴ However, a proliferation of litigation also followed. Students found responsible of campus sexual assault, most of whom were males, increasingly began suing their schools alleging due process violations in their adjudications.⁵ In 2018, the Trump administration's Department of Education proposed a new rule (the "Proposed Rule"), in part to strengthen what it perceived as procedural deficiencies in the

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1. *Campus Sexual Violence Statistics*, RAPE, ABUSE & INCEST NAT'L NETWORK, <https://www.rainn.org/statistics/campus-sexual-violence>.

2. President Barack Obama & Vice President Joseph Biden, *Remarks by the President and Vice President at an Event for the Council on Women and Girls* (Jan. 22, 2014), <https://obamawhitehouse.archives.gov/the-press-office/2014/01/22/remarks-president-and-vice-president-event-council-women-and-girls>.

3. See, e.g., Christopher Krebs et al, *Campus Sexual Assault Study*, NAT'L INST. OF JUSTICE, DEP'T OF JUSTICE 5-3 (Dec. 2007), <https://www.ncjrs.gov/pdffiles1/nij/grants/221153.pdf> ("Overall, 19% of undergraduate women reported experiencing attempted or completing sexual assault since entering college."); see also Christopher Krebs et al, *Campus Climate Survey Validation Study Final Technical Report*, BUREAU OF JUSTICE STAT., DEP'T OF JUSTICE 73 (Jan. 2016), <https://www.bjs.gov/content/pub/pdf/ccsvsfr.pdf> ("The prevalence rate for completed sexual assault since entering college among the female sample . . . [was an] average rate of 21%.").

4. Nancy Gertner, *Sex, Lies and Justice*, AM. PROSPECT (Jan. 12, 2015), <https://prospect.org/justice/sex-lies-justice/>.

5. Greta Anderson, *More Title IX Lawsuits by Accusers and Accused*, INSIDE HIGHER EDUC. (Oct. 3, 2019), <https://www.insidehighered.com/news/2019/10/03/students-look-federal-courts-challenge-title-ix-proceedings>.

regulatory landscape established by the previous administration.⁶ This Note analyzes the extent to which the Proposed Rule brings the scales back to equipoise by strengthening the due process rights for the accused, and where the Proposed Rule falls short of sufficiently supporting the victims. The Proposed Rule appropriately affords basic due process rights that were either explicitly or implicitly lacking under the old regime, but in some instances the Proposed Rule overreaches at the expense of the victims.

I. BACKGROUND

The Department of Education (“DOE”) utilizes Title IX of the Education Amendments of 1972 to address student-on-student sexual misconduct at recipient schools.⁷ Although Title IX is now inexorably linked to campus sexual misconduct, Title IX and related DOE regulations initially focused on ensuring that schools themselves did not discriminate based on sex.⁸ Title IX “prohibits discrimination on the basis of sex in any federally funded education program or activity.”⁹ It authorizes DOE to promulgate rules and terminate federal funds of recipient schools out of compliance with those rules.¹⁰ Under the first regulations promulgated by DOE, which are still in force today, recipient schools must: (1) adopt, publish, and distribute a policy stating that the school does not discriminate based on sex,¹¹ (2) designate at

6. *Secretary DeVos: Proposed Title IX Rule Provides Clarity for Schools, Support for Survivors, and Due Process for All*, U.S. DEP’T OF EDUC. (Sept. 7, 2017), <https://www.ed.gov/news/press-releases/secretary-devos-proposed-title-ix-rule-provides-clarity-schools-support-survivors-and-due-process-rights-all>.

7. Throughout this Note, “recipient schools” or “schools” refers to postsecondary educational institutions that receive federal financial assistance for educational programs or activities from the U.S. Department of Education.

8. 34 C.F.R. § 106.1 (2019) (describing the purpose of the regulations effectuating Title IX as eliminating sex discrimination in educational programs); 34 C.F.R. § 106.8 (2019) (requiring schools develop grievance procedures to resolve complaints of sex discrimination by the schools themselves); Jacob Gersen & Jeannie Suk, *The Sex Bureaucracy*, 104 CALIF. L. REV. 881, 898 (2016) (explaining that the current view of Title IX as addressing student-on-student sexual misconduct “was alien at the time of enactment”).

9. *Title IX of the Education Amendments of 1972*, 20 U.S.C. § 1681(a) (2018).

10. *See id.* § 1682 (“Each Federal department and agency which is empowered to extend Federal financial assistance to any education program or activity . . . is authorized and directed to effectuate the provisions of section 1681 of this title . . . by issuing rules, regulations, or orders of general applicability Compliance with any requirement adopted pursuant to this section may be effected . . . by the termination of or refusal to grant or to continue assistance under such program or activity to any recipient.”); *see also Title IX and Sex Discrimination*, U.S. DEP’T OF EDUC. (Apr. 2015), https://www2.ed.gov/about/offices/list/ocr/docs/tix_dis.html.

11. 34 C.F.R. § 106.9(a)–(c).

least one employee to serve as a Title IX Coordinator,¹² and (3) create and publish grievance procedures “providing for prompt and equitable resolution” of sex discrimination.¹³ The Office of Civil Rights (“OCR”) within DOE enforces Title IX by investigating and resolving complaints of sex discrimination and conducting institution-level compliance reviews.¹⁴ The Supreme Court has also recognized a federal private right of action for victims of sex discrimination by recipient schools.¹⁵

After the promulgation of the 1975 regulations, the Supreme Court clarified recipient schools’ obligations to address sexual harassment as a form of sex discrimination. In 1992, the Court found that Title IX applied to employee-on-student sexual harassment¹⁶ when the school had “actual knowledge” of the harassment and responded with “deliberate indifference.”¹⁷ In 1999, the Court extended these holdings to student-on-student sexual harassment, holding that a school can be liable if it “acts with deliberate indifference to the known acts of harassment in its programs or activities” but “only for harassment that is so severe, pervasive, and objectively offensive that it effectively bars the victim’s access to an educational opportunity or benefit.”¹⁸ OCR guidance in 1997 and 2001 began to address sexual harassment as a form of sex discrimination, focusing on schools’ obligations to ensure the schools themselves do not commit or perpetuate sex discrimination.¹⁹ In 1997, OCR determined that schools create a

12. *Id.* § 106.8(a).

13. *Id.* § 106.8(b).

14. *Title IX and Sex Discrimination*, OFFICE OF CIVIL RIGHTS, U.S. DEP’T OF EDUC. (2015), https://www2.ed.gov/about/offices/list/ocr/docs/tix_dis.html.

15. *Cannon v. Univ. of Chi.*, 441 U.S. 677, 703, 717 (1979) (“We have no doubt that Congress intended to create Title IX remedies comparable to those available under Title VI and that it understood Title VI as authorizing an implied private cause of action for victims of the prohibited discrimination.”).

16. *See Franklin v. Gwinnet Cty. Pub. Sch.*, 503 U.S. 60, 76 (1992) (granting remedy to student harmed by an employee’s sexual harassment).

17. *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 290 (1992).

18. *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 633, 633 (1999).

19. *See Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties*, 62 Fed. Reg. 12,034, 12,040 (Mar. 13, 1997) [hereinafter “1997 Guidance”] (“Thus, Title IX does not make a school responsible for the actions of harassing students, but rather for its own discrimination in failing to remedy it once the school has notice.”); *see also* Office for Civil Rights, *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties*, U.S. DEP’T OF EDUC. 12 (Jan. 19, 2001), <https://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf> [hereinafter “2001 Guidance”] (notice of publication being located at 66 Fed. Reg. 5512) (“[A]s long as the school, upon notice of the harassment, responds by taking prompt and effective action to end the harassment and

“hostile environment” by failing to address sexual harassment.²⁰ Once remedied, schools sufficiently complied with Title IX.²¹ In 2001, OCR clarified how to remedy such a hostile environment and established six factors it would consider when investigating schools’ grievance procedures to determine whether they comport with a “prompt and equitable resolution” for incidents of sex discrimination.²²

In 2011, OCR fundamentally shifted its enforcement of Title IX.²³ OCR issued a “Dear Colleague Letter,” (“DCL”) establishing specific procedural requirements that recipient schools must utilize to remedy student-on-student sexual harassment.²⁴ The DCL was later supplemented by a 2014 guidance document.²⁵ The DCL introduced “sexual violence” as a type of harassment covered under Title IX, mandated a preponderance of the evidence standard for sexual misconduct adjudications, declined to require live hearings, and expressed a strong disapproval of the use of cross-examination.²⁶ While the DCL facially provided claimants and respondents equal rights throughout the process,²⁷ it was widely perceived by judges and legal commentators as promoting the rights of victims at the expense of the accused.²⁸ The DCL dedicated two sentences of the nineteen-page

prevent its recurrence, the school has carried out its responsibility under the Title IX Regulations.”).

20. *1997 Guidance*, *supra* note 19, at 12,039.

21. *Id.* at 12,039–40.

22. *2001 Guidance*, *supra* note 19, at 20 (the notice of publication is located at 66 Fed. Reg. 5512) (“[1] Notice . . . of the procedure, including where complaints may be filed; [2] Application of the procedure to complaints . . .; [3] Adequate, reliable, and impartial investigations of complaints, including the opportunity to present witnesses and other evidence; [4] Designated and reasonably prompt timeframes for the major stages of the complaint process; [5] Notice to the parties of the outcome of the complaint; and [6] An assurance that the school will take steps to prevent recurrence of any harassment and to correct its discriminatory effects on the complainant and others, if appropriate.”).

23. Jacob Gersen & Jeannie Suk, *The Sex Bureaucracy*, 104 CALIF. L. REV. 881, 901 (2016). The authors suggest that through the DCL, OCR signaled to schools that their grievance procedures would now be subject to governmental oversight, whereas previously OCR “simply” monitored whether schools themselves were engaging in sex discrimination. *Id.* at 902.

24. Letter from Russlynn Ali, Assistant Sec’y, Office for Civil Rights, U.S. Dep’t of Educ., to Colleague (Apr. 4, 2011), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf> [hereinafter “Dear Colleague Letter”].

25. *Questions and Answers on Title IX and Sexual Violence*, U.S. DEP’T OF EDUC. (Apr. 29, 2014), <https://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf>.

26. Dear Colleague Letter, *supra* note 24, at 1, 10–12.

27. *See id.* at 11 (providing both parties with an equal opportunity to present relevant witnesses and other evidence).

28. *See, e.g., Plummer v. Univ. of Houston*, 860 F.3d 767, 779 (5th Cir. 2017) (Jones, J., dissenting) (“[The OCR] procedures prescribed for adjudication of sexual misconduct are heavily weighted in favor of finding guilt.”); *see also* Task Force on the Response of Universities and Colleges to Allegations of Sexual Violence, *White Paper on Campus Sexual Assault Investigations*,

guidance to the procedural protections schools should afford accused students:

Public and state-supported schools must provide due process to the alleged perpetrator. However, schools should ensure that steps taken to accord due process rights to the alleged perpetrator do not restrict or unnecessarily delay the Title IX protections of the complainant.²⁹

OCR vigorously enforced the DCL.³⁰ It published and regularly updated a list of schools under investigation;³¹ by 2018, OCR had 305 active investigations.³² Fearing financial repercussions,³³ schools “scrambled” to comply and “stave off or resolve OCR investigations.”³⁴ Many schools modified their grievance procedures in ways that made sexual misconduct cases easier to resolve. For example, some schools removed protections previously afforded to accused students;³⁵ others lowered the burden to preponderance of the evidence for sexual misconduct cases while retaining higher burdens for other types of misconduct.³⁶ When Harvard changed its policies in 2011, a group of

AM. C. OF TRIAL LAW. 19 (Mar. 2017), https://www.actl.com/docs/default-source/default-document-library/position-statements-and-white-papers/task_force_allegations_of_sexual_violence_white_paper_final.pdf (“Concerns of withdrawal of federal funding combined with media attention surrounding campus sexual assault, may cause universities—consciously or not—to err on the side of protecting or validating the complainant at the expense of the accused.”).

29. Dear Colleague Letter, *supra* note 24, at 12. This characterization is not entirely accurate, see discussion *infra* Section III.

30. *U.S. Department of Education Releases List of Higher Education Institutions with Open Title IX Sexual Violence Investigations*, U.S. DEP’T OF EDUC. (May 1, 2014), <http://www.ed.gov/news/press-releases/us-department-education-releases-list-highereducation-institutions-open-title-i> (“[Recipients that] violate the law and refuse to address the problems identified by OCR can lose federal funding or be referred to the U.S. Department of Justice for further action.”).

31. *Id.*; Nick DeSantis, *Education Dept. Stops Providing Details on Resolved Title IX Cases*, CHRON. OF HIGHER EDUC. (Mar. 15, 2018), <https://www.chronicle.com/article/Education-Dept-Stops/242831/>.

32. *Title IX Tracker*, CHRON. OF HIGHER EDUC. (last updated Mar. 15, 2018), <http://projects.chronicle.com/titleix/>. The Chronicle of Higher Education aggregated data on open and resolved OCR Title IX investigations up until March 15, 2018 when OCR announced it would stop providing information on its Title IX cases. *Id.*

33. *Doe v. Purdue*, 928 F.3d 652, 668 (7th Cir. 2019); *Rethink Harvard’s Sexual Harassment Policy*, BOS. GLOBE (Oct. 14, 2014), <https://www.bostonglobe.com/opinion/2014/10/14/rethink-harvard-sexual-harassment-policy/HFDDiZN7nU2UwuUuWMnqbM/story.html>.

34. Gersen & Suk, *supra* note 23, at 902.

35. See, e.g., *Doe v. Brandeis Univ.*, 177 F. Supp. 3d 561, 578 (D. Mass. 2016) (noting that from 2011–12 manual to the 2013–14 manual, the school made “significant revisions to the process . . . with even fewer protections to the accused”); *Doe v. Wash. and Lee Univ.*, No. 6: 14-CV-00052, 2015 WL 4647996, at *9 (W.D. Va. Aug. 5, 2015) (noting that the school removed the accused student’s right to counsel, among other changes).

36. See, e.g., *Brandeis University*, 177 F. Supp. 3d at 607 (lowering standard to preponderance of the evidence for sexual misconduct and retained clear and convincing for other code

Harvard Law professors denounced the new sexual misconduct policy as “lack[ing] the most basic elements of fairness and due process” and called the process “overwhelmingly stacked against the accused.”³⁷

In the wake of this regulatory shift, a wave of male students found responsible in sexual misconduct adjudications at the campus level sued their schools with some success. These students alleged either or both of gender discrimination under Title IX³⁸ and due process violations.³⁹ Regardless of intent, OCR pitted the accused students’ due process rights against those of the victims, putting schools in a “double bind.”⁴⁰ Schools either “c[a]me under public fire for not responding to allegations of sexual assault aggressively enough or they open[ed] themselves to Title IX simply by enforcing rules against perpetrators.”⁴¹

After the 2016 election and change in administration, DOE withdrew the DCL⁴² and announced its intention to promulgate new rules specifying schools’ Title IX obligations.⁴³ In its Proposed Rule, DOE established several “procedural safeguards” schools must integrate into their grievance procedures.⁴⁴ These included: impartial decision makers, the accused’s right to written notice of the charges, equal ability to access and present evidence and witnesses, the requirement of a live hearing with cross-examination, and the option for schools to utilize a clear and convincing standard of proof.⁴⁵ As of April 7, 2020, the comment period has closed and the Proposed Rule is

violations); *Wash. and Lee Univ.*, 2015 WL 4647996 at *9 (lowering standard to preponderance of the evidence for sexual misconduct rather and retained beyond a reasonable doubt for honor code violations).

37. *Rethink Harvard’s Sexual Harassment Policy*, BOS. GLOBE (Oct. 14, 2014), <https://www.bostonglobe.com/opinion/2014/10/14/rethink-harvard-sexual-harassmentpolicy/HFDDiZN7nU2UwuUuWMnqbM/story.html>.

38. *E.g.*, *Doe v. Columbia Univ.*, 831 F.3d 46, 48 (2d Cir. 2016) (alleging gender discrimination).

39. *E.g.*, *Austin v. Univ. of Or.*, 205 F. Supp. 3d 1214, 1217 (D. Or. 2016) (alleging both gender discrimination and due process violations).

40. *See id.* at 1226.

41. *Id.* at 1226–27.

42. Letter from Candice Jackson, Acting Assistant Sec’y for Civil Rights, U.S. Dep’t of Educ. to Colleague, (Sept. 22, 2017), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-title-ix-201709.pdf>.

43. Secretary Betsy DeVos, *Secretary DeVos Prepared Remarks on Title IX Enforcement* (Sept. 7, 2017), <https://www.ed.gov/news/speeches/secretary-devos-prepared-remarks-title-ix-enforcement>.

44. *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, 83 Fed. Reg. 61,462, 61,474–75, 61,477 (proposed Nov. 29, 2018) (to be codified at 34 C.F.R. pt. 106).

45. *Id.* at 61,471–72.

being finalized.⁴⁶ Unsurprisingly, the Proposed Rule was met with resistance in the public debate, and many news outlets portrayed it as an assault on women's rights.⁴⁷ However, a more nuanced discussion is necessary as to the procedural protections afforded to accused students.

II. DUE PROCESS

As state institutions, public colleges must comport with due process. Although the Due Process Clause does not extend to actions by private actors, students at private colleges may also have some due process-esque rights. Students at private colleges may benefit from a judicially formed right to basic fairness, and courts have referred to due process principles when evaluating the fundamental fairness of college sexual misconduct disciplinary procedures.⁴⁸ Students may also have an implied state contract law right to procedural protections that schools voluntarily promise to provide its students in handbooks or other materials.⁴⁹

The Due Process right found in the Constitution protects against the “depriv[ation] of life, liberty, or property without due process of law,”⁵⁰ and is applicable to the federal government and state governments through the Fifth and Fourteenth Amendments, respectively. To successfully state a due process claim, a student must have a sufficient property or liberty interest upon which the school infringed.⁵¹ Then, the reviewing court determines what process, if any,

46. Simone C. Chu & Iris M. Lewis, *What Happens Next with Title IX: DeVos's Proposed Rule, Explained*, HARV. CRIMSON (Feb. 27, 2019), <https://www.thecrimson.com/article/2019/2/27/title-ix-explainer/>; Nicole Gaudiano, *New Title IX Rule Ready to Drop*, POLITICO (Apr. 1, 2020), <https://www.politico.com/newsletters/morning-education/2020/04/01/new-title-ix-rule-ready-to-drop-despite-pleas-for-delay-786557>.

47. E.g., Jennifer Medina & Emma G. Fitzsimmons, ‘An Attack on Students’ Rights’ *Reactions to Betsy DeVos’s New Rules on Sexual Assault*, N.Y. TIMES (Aug. 30, 2018), <https://www.nytimes.com/2018/08/30/us/devos-college-sexual-assault.html>; Dana Bolger & Alexandra Brodsky, *Betsy DeVos’s Title IX Interpretation is an Attack on Sexual Assault Survivors*, WASH. POST (Sept. 8, 2017), <https://www.washingtonpost.com/news/posteverything/wp/2017/09/08/betsy-devoss-title-ix-interpretation-is-an-attack-on-sexual-assault-survivors/>.

48. See, e.g., *Doe v. Brandeis Univ.*, 177 F. Supp. 3d 561, 602 (D. Mass. 2016).

49. See, e.g., *Doe v. Trs. Of Boston Coll.*, 892 F.3d. 67, 87 (1st Cir. 2018) (finding an implied covenant of good faith and fair dealing imposed under Massachusetts contract law applied in the context of school disciplinary proceedings); see also *Ebert v. Yeshiva Univ.*, 780 N.Y.S.2d 283, 286 (N.Y. Sup. Ct. 2004) (noting that courts will review private university action as to whether the school followed its own policies and acted in good faith).

50. U.S. CONST. amend. V, XVIII.

51. See, e.g., *Matthews v. Eldridge*, 424 U.S. 319, 332 (1976). In the context of campus sexual assault cases, suspensions and expulsions can implicate a protected property interest. See, e.g.,

the Constitution requires using the three-part balancing test the Supreme Court established in *Matthews v. Eldridge*.⁵² This test balances: (1) the private interest of the accused student; (2) the interest of the college, including “fiscal and administrative burdens;” and (3) the “risk of an erroneous deprivation of [the accused student’s] interest through the procedures used, and the probative value, if any, of additional or substitute procedural safeguards.”⁵³ Due process “is not a technical conception with a fixed content unrelated to time, place, and circumstances.”⁵⁴ More serious deprivations of a protected interest require more demanding process.⁵⁵ At a minimum, the Supreme Court has held that students in campus disciplinary proceedings are entitled to “some kind of notice and some kind of hearing.”⁵⁶ Due process does not, however, entitle accused students to the full trial rights afforded to criminal defendants.⁵⁷ Fundamentally, due process requires that the accused has a meaningful opportunity to be heard and defend him or herself.⁵⁸

In the context of college sexual misconduct cases, courts have recognized that both students accused of sexual misconduct and schools adjudicating such cases have compelling interests at stake. Charges of sexual assault “carry the potential for substantial public condemnation and disgrace”⁵⁹ and they can affect long-term educational and employment prospects.⁶⁰ Moreover, students have an interest in avoiding wrongful punishment and the consequential stigma.⁶¹

Doe v. Univ. of Cincinnati, 872 F.3d 393, 399 (6th Cir. 2017) (suspension); Doe v. Northern Mich. Univ., 393 F.Supp.3d 683, 693 (W.D. Mich. 2019) (quoting *Univ. of Cincinnati*, 872 F.3d. at 399) (expulsion). Courts have found sufficient liberty interests rooted in reputational harm or the liberty to pursue a certain career. *See, e.g.*, Doe v. Purdue Univ., 928 F.3d 652, 661–63 (7th Cir. 2019) (freedom to pursue a career in the Navy); *Univ. of Cincinnati*, 872 F.3d. at 399 (reputational harm).

52. *E.g.*, *Univ. of Cincinnati*, 872 F.3d at 399 (citing *Matthews*, 424 U.S. at 334–35).

53. *Matthews*, 424 U.S. at 334–35.

54. *Id.* (quoting *Cafeteria Workers v. McElroy*, 386 U.S. 886, 895 (1961)).

55. *See, e.g.*, *Goss v. Lopez*, 419 U.S. 565, 584 (1975) (noting that expulsions and suspensions longer than the 10-day suspension at issue in this case “may require more formal procedures.”)

56. *Id.* at 579.

57. *See infra* note 82 and accompanying text.

58. *See Matthews*, 424 U.S. at 333 (“The fundamental requirement of due process is the opportunity to be heard ‘at a meaningful time and in a meaningful manner.’” (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965))).

59. *Doe v. Brandeis Univ.*, 177 F. Supp. 3d 561, 607 (D. Mass. 2016).

60. *E.g.*, *Doe v. Baum*, 903 F.3d 575, 582 (6th Cir. 2018); *Plummer v. Univ. of Houston*, 860 F.3d 767, 773 (5th Cir. 2017).

61. *Haidak v. Univ. Of Mass.-Amherst*, 933 F.3d 56, 66 (1st Cir. 2019).

Schools have a strong interest in maintaining a safe educational environment, protecting their campuses from those who violate the schools' codes of conduct or policies,⁶² and conserving finite administrative resources."⁶³ Because Title IX ultimately serves to eliminate sex discrimination in educational programs, the adjudication of campus sexual misconduct under Title IX requires that recipient schools consider the victims' rights. Victims have a strong interest in continuing their education while avoiding re-victimization.⁶⁴ Growing evidence illustrates the detrimental effects the adversarial system can have on victims, especially cross-examination at live hearings.⁶⁵ Victims' advocates suggest that trauma-informed procedures—those that take into account the effects of trauma from sexual offenses—can limit re-victimization and protect victims' mental and emotional well-being.⁶⁶

III. EVALUATION OF PROPOSED RULE

Five overarching due process protections in the Proposed Rule will be evaluated: (1) reduction of presumptions and biases; (2) notice of the charges; (3) equal access and presentment rights with respect to evidence; (4) live hearing with cross-examination; and (5) the burden of proof. This section compares these five protections to the old guidance under the DCL, assesses the degree to which the Proposed Rule comports with due process, and proposes modifications to the Proposed Rule when necessary to ensure sufficient protections for the victims.

62. *E.g., id.*

63. *E.g., Plummer*, 860 F.3d at 774–75; *Goss v. Lopez*, 419 U.S. 565, 583 (1975) (“[F]urther formalizing the suspension process and escalating its formality and adversary nature may not only make it too costly as a regular disciplinary tool but also destroy its effectiveness as part of the teaching process.”).

64. See Cecilia Mengo & Beverly M. Black, *Violence Victimization on a College Campus: Impact on GPA and Student Dropout*, 18(2) J. C. STUDENT RETENTION: RES., THEORY, & PRAC. 234, 242–43 (2015), <https://journals.sagepub.com/doi/pdf/10.1177/1521025115584750> (finding that compared to college students who experience physical/verbal victimization, students who experience sexual victimization drop out of school and see their GPAs drop more frequently); Audrey Chu, *I Dropped Out of College Because I Couldn't Bear to See My Rapist on Campus*, VICE (Sept. 26, 2017), https://broadly.vice.com/en_us/article/qvjzpd/i-dropped-out-of-college-because-i-couldnt-bear-to-see-myrapist-on-campus.

65. Mary Fan, *Adversarial Justice's Casualties: Defending Victim-Witness Protection*, 55 B.C. L. REV. 775, 775 (2014).

66. *The Importance of Understanding Trauma-Informed Care and Self-Care for Victim Service Providers*, U.S. DEP'T OF JUSTICE (July 30, 2014), <https://www.justice.gov/archives/ovw/blog/importance-understanding-trauma-informed-care-and-self-care-victim-service-providers>.

A. Presumptions and Biases

The Proposed Rule includes a number of requirements to reduce biases. First, colleges must impose a presumption of non-responsibility “until a determination regarding responsibility is made.”⁶⁷ Second, “credibility determinations may not be based on a person’s status as a complainant, respondent, or witness.”⁶⁸ A decision maker cannot “have a conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent” and training materials cannot “rely on sex stereotypes.”⁶⁹ The DCL guidance required that conflicts of interests be disclosed, with no discussion of potential biases.⁷⁰ Third, the Proposed Rule requires colleges to separate the decision maker from the investigator.⁷¹ This eliminates the “single-investigator model” implicitly permitted under the DCL guidance.⁷² Under this model, one person serves as both the investigator, who gathers evidence, and the decision maker, who evaluates the evidence and renders a decision.⁷³ Each of the factors described above are addressed in turn.

1. Presumption of Non-Responsibility

While the DCL guidance facially required impartiality,⁷⁴ in reality schools “institutionaliz[ed] a presumption of guilt in sexual assault cases.”⁷⁵ For example, Stanford University’s training materials included

67. *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, 83 Fed. Reg. 61,462, 61,472 (proposed Nov. 29, 2018) (to be codified at 34 C.F.R. pt. 106).

68. *Id.*

69. *See id.* at 61,473 (“[D]ecision-maker [may] not have a conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent[.]”).

70. Dear Colleague Letter, *supra* note 24, at 12.

71. *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, 83 Fed. Reg. at 61, 477

72. *See Questions and Answers on Title IX and Sexual Violence*, *supra* note 25, at 11–12 (imposing no requirements on who conducts the investigation, and noting that the Title IX Coordinator can serve as both the investigator and the decision maker, barring any conflicts of interest).

73. ABA Criminal Justice Section Council, *ABA Criminal Justice Section Task Force on College Due Process Rights and Victim Protections: Recommendations for Colleges and Universities in Resolving Allegations of Campus Sexual Misconduct*, AM. BAR ASS’N 3 (June 2017), <https://www.americanbar.org/content/dam/aba/publications/criminaljustice/2017/ABA-Due-Process-Task-Force-Recommendations-and-Report.authcheckdam.pdf>.

74. Dear Colleague Letter, *supra* note 24, at 12 (“[P]rocesses cannot be equitable unless they are impartial.”).

75. Peter Perkowitz, *College Rape Accusations and the Presumption of Male Guilt*, WALL STREET JOURNAL (Aug. 20, 2011), <https://www.wsj.com/articles/SB10001424053111903596904576516232905230642>.

an excerpt from a book titled: “*Why Did He Do That? Inside the Minds of Angry and Controlling Men*.”⁷⁶ This resource instructed: “Everyone should be very very cautious in accepting a man’s claim that he has been wrongly accused.”⁷⁷ Another document in Stanford’s training materials on how to identify an abuser indicates that “[a]ct[ing] persuasive and logical” is indicative of an abuser.⁷⁸ An argument in favor of the non-responsibility presumption rests on the de facto presumption of guilt imposed by many schools under the DCL. In 2017, a Federal Court of Appeals judge remarked that OCR “procedures prescribed for adjudication of sexual misconduct are heavily weighted in favor of finding guilt.”⁷⁹

However, the presumption of non-responsibility is not required under due process principles and may unfairly tilt the scales in the favor of the accused. A presumption of non-responsibility should be viewed as distinct from the presumption of innocence afforded to criminal defendants.⁸⁰ For one, criminal defendants retain this presumption until found guilty beyond a reasonable doubt, a higher burden not applied in campus disciplinary procedures.⁸¹ Campus sexual assault adjudications will also never result in incarceration or loss of life. Further, courts have routinely held that students in campus disciplinary procedures are not entitled to the full trial rights enjoyed by criminal defendants.⁸² In its public comment in response to the proposed rule, the American Civil Liberties Union noted that the presumption of non-responsibility is unnecessary because under either a preponderance of

76. Mike Armstrong, *Op-Ed: A Thumb on the Scale of Justice*, STAN. DAILY (Apr. 29, 2011), <https://www.stanforddaily.com/2011/04/29/op-ed-a-thumb-on-the-scale-of-justice/>.

77. *Id.*

78. *Id.*

79. *Plummer v. Univ. of Houston*, 860 F.3d 767, 779 (5th Cir. 2017) (Jones, J., dissenting).

80. *See* American Civil Liberties Union, Comment Letter on Proposed Rule “Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance” n. 71 (Jan. 30, 2019), <https://www.aclu.org/letter/aclu-comments-title-ix-proposed-rule> [hereinafter “ACLU Comment Letter”] (clarifying that the presumption of responsibility does not appear in any other legal context and is not to be confused with the presumption of innocence).

81. Democratic Attorneys General, Comment Letter on Proposed Rule “Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance” 35 (Jan. 30, 2019), <https://www.attorneygeneral.gov/wp-content/uploads/2019/01/2019-01-31-Title-IX-Comments-Final.pdf> [hereinafter “Attorneys General Comment Letter”].

82. *E.g.*, *Doe v. Baum*, 903 F.3d 575, 583 (6th Cir. 2018) (personally confront accuser or witnesses); *Flaim v. Med. Coll. of Ohio*, 418 F.3d 629, 635 (6th Cir. 2005) (rules of criminal procedure and open hearings); *Nash v. Auburn Univ.*, 812 F.2d 655, 665 (11th Cir. 1987) (rules of evidence); *Henson v. Honor Committee of Univ. of Va.*, 719 F.2d 69, 73 (4th Cir. 1983) (same); *Dixon v. Ala. State Bd. Of Educ.*, 294 F.2d 150, 159 (5th Cir. 1961) (“a full-dress judicial hearing”).

the evidence or clear and convincing standard, the respondent prevails if “the evidence is in equipoise.”⁸³ Further, a presumption akin to a presumption of innocence perpetuates rape myths, namely that women often lie about sexual assault.⁸⁴ A presumption of non-responsibility is also itself a form of bias, and imposing this presumption seemingly cuts against one of the primary purposes of the Proposed Rule—to eliminate biases.⁸⁵

2. Impartial Decision Makers

Due process requires an impartial adjudication process, which inherently includes an unbiased decision maker.⁸⁶ Furthermore, the due process right of “some kind of hearing” afforded to students in campus disciplinary procedures⁸⁷ would be meaningless if the decision maker “came to the hearing having predetermined [the accused’s] guilt.”⁸⁸

The Proposed Rule generally strengthens the impartiality of the decision maker by disallowing conflicts of interests and biases and excluding the consideration of status as a victim or accused from credibility determinations.⁸⁹ An impartial tribunal is an essential feature of due process,⁹⁰ and the same holds true in the campus

83. ACLU Comment Letter, *supra* note 80.

84. See National Crime Victim Bar Association, Comment Letter on Proposed Rule “Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance” 11 (Jan. 30, 2019), <https://www.regulations.gov/document?D=ED-2018-OCR-0064-102838> [hereinafter “NCVBA Comment Letter”].

85. See *Secretary DeVos: Proposed Title IX Rule Provides Clarity For All Schools, Support for Survivors, and Due Process Rights for All*, U.S. DEP’T OF EDUC. (Nov. 16, 2018) (stating DOE’s goal with the proposed regulation was to ensure Title IX proceeding become more “transparent, consistent and reliable” and ensuring Title IX “protects all students.”).

86. *Doe v. Cummins*, 662 F. App’x. 437, 449 (6th Cir. 2016) (citing *Withrow v. Larkin*, 421 U.S. 35, 47 (1975)) (“It is unquestioned that a fundamental due-process requirement is an impartial and unbiased adjudicator.”). See also *Doe v. Brandeis Univ.*, 177 F. Supp. 3d 561, 608 (D. Mass. 2016) (“[O]ne of the most basic components of fairness is an unbiased and neutral fact-finder.”).

87. *Goss v. Lopez*, 419 U.S. 565, 579 (1979).

88. *Doe v. Purdue Univ.*, 928 F.3d 652, 663–64 (7th Cir. 2019) (quoting *Dietchweiler v. Lucas*, 827 F.3d 622, 629 (7th Cir. 2016)) (reversing the dismissal of a § 1983 due process claim on a 12(b)(6) motion and holding that the student adequately pled that he was deprived due process, in part because two of the three members of the hearing panel rendered a decision without reviewing the investigatory report, suggesting that they determined his guilt based solely on the accusations and not the evidence).

89. See *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, 83 Fed. Reg. at 61,462, 61,472.

90. *E.g.*, *Schweiker v. McClure*, 456 U.S. 188, 195 (1982) (“As this Court repeatedly has recognized, due process demands impartiality on the part of those who function in judicial or quasi-judicial capacities.”).

disciplinary context.⁹¹ The Proposed Rule makes clear that favoring or disfavoring either party can generate liability for sex discrimination.⁹² Although the DCL purported to instill impartiality in decision makers,⁹³ these explicit requirements are necessary in light of the reality of the DCL's effect. The financial pressure exerted by OCR and negative media attention have contributed to due process violations. For example, the District of Colorado found it plausible that a Title IX coordinator and an investigator were biased because they were "under scrutiny due to [an] OCR investigation and related public pressure," which in turn contributed to a plausible due process violation.⁹⁴ Another federal court found a plausible due process claim rooted in impartiality in part because, at the hearing, the Title IX coordinator and lead investigator gave "the appearance of support for [the complainant]."⁹⁵

Moreover, male students lacking viable due process claims have successfully pleaded claims of gender bias under Title IX. Courts have found sufficient allegations of gender bias based on sex stereotypes and generalizations,⁹⁶ efforts to quell public criticism, and attempts to shield from financial repercussions by OCR.⁹⁷ For example in *Doe v. Columbia University*, the Second Circuit found that a plaintiff sufficiently alleged that his decision makers "were all motivated . . . by pro-female, anti-male bias," at least partially to refute mounting campus and public criticism "that Columbia was turning a blind eye to female students' charge of sexual assaults by male students."⁹⁸ With respect to financial pressures, the Seventh Circuit noted that OCR opening two investigations into a school rendered "the pressure on the university to demonstrate compliance . . . far from abstract."⁹⁹ Similarly,

91. *E.g.*, *Doe v. Miami Univ.*, 882 F.3d 579, 601 (6th Cir. 2011) (holding students entitled to presumption of impartiality in disciplinary action); *Park v. Temple Univ.*, 757 F. App'x. 102, 106 (3d Cir. 2018).

92. *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, 83 Fed. Reg. at 61,473.

93. *See* Dear Colleague Letter, *supra* note 24, at 12 (highlighting procedural flaws and shortcoming in OCR policy).

94. *Norris v. Univ. of Colorado, Boulder*, 362 F. Supp. 3d 1001, 1007, 1021 (D. Colo. 2019).

95. *Gischel v. Univ. of Cincinnati*, 302 F. Supp. 3d 961, 978–79 (S.D. Ohio 2018).

96. *Doe v. Brandeis Univ.*, 177 F. Supp. 3d 561, 608 (D. Mass. 2016) (finding "reason to believe the Special Examiner decided [a male student's] guilt to a substantial degree on unfair generalizations, stereotypes, or logical fallacies").

97. *Doe v. Columbia Univ.*, 831 F.3d 46, 56, 57 (2d Cir. 2016).

98. *Id.* at 57.

99. *See Doe v. Purdue Univ.*, 928 F.3d 652, 669 (7th Cir. 2019). The court went on to note that evidence of various institutional pressures and the DCL in and of itself does not "get [a plaintiff] over the plausibility line." *Id.* at 669.

the First¹⁰⁰ and Sixth¹⁰¹ Circuits have suggested that financial pressures exerted by OCR could support a plausible inference of gender bias, if sufficiently pleaded.

3. Single-Investigator Model

The single-investigator model is appropriately eliminated under the Proposed Rule.¹⁰² Under this model, used by many schools under the DCL guidance, the person that gathers the evidence also makes factual findings about that evidence. One court described the single investigator as “simultaneously the investigator, the prosecutor, and the judge who determines guilt.”¹⁰³ Although several federal circuit courts have found that a decision maker assuming multiple roles in the adjudicatory process is not a per se violation of due process, it can give rise to a due process violation based in part on an impartial tribunal.¹⁰⁴ Courts and legal professionals have denounced this model as inherently susceptible to biases.¹⁰⁵ Regardless of good intentions, any individual can have implicit biases, make mistakes, or reach premature conclusions.¹⁰⁶ Having a neutral party evaluate the evidence and reach a determination reduces the risk of erroneous outcomes.¹⁰⁷

100. *See Doe v. Tr. of Bos. Coll.*, 892 F.3d 67, 92–93 (1st Cir. 2018) (finding an allegation of gender bias motivated by the DCL meritless because the plaintiff did not plead facts explaining how it affected his specific adjudication).

101. *Doe v. Miami Univ.*, 882 F.3d 579, 594 (6th Cir. 2018); *Doe v. Baum*, 903 F.3d 575, 586 (6th Cir. 2018).

102. *See Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, 83 Fed. Reg. 61,462, 61,477 (proposed Nov. 29, 2018) (to be codified at 34 C.F.R. pt. 106).

103. *Doe v. Brandeis Univ.*, 177 F. Supp. 3d 561, 579 (D. Mass. 2016). *But cf. Purdue Univ.*, 928 F.3d at 664 (noting that the single-investigator model does not necessarily render the process unfair, but rather a plaintiff must rebut a presumption of impartiality and show prejudice by the single-investigator).

104. *E.g., Heyne v. Metro. Nashville Pub. Schs.*, 655 F.3d 556, 567 (6th Cir. 2011).

105. *Brandeis Univ.*, 177 F. Supp. 3d at 606 (noting that the dangers of combining these functions in one person are “obvious”); ABA Criminal Justice Section Council, *ABA Criminal Justice Section Task Force on College Due Process Rights and Victim Protections: Recommendations for Colleges and Universities in Resolving Allegations of Campus Sexual Misconduct*, AM. BAR ASS’N 3 (June 2017), <https://www.americanbar.org/content/dam/aba/publications/criminaljustice/2017/ABA-Due-Process-Task-Force-Recommendations-and-Report.authcheckdam.pdf> (reporting that this model “carries inherent structural fairness risks”).

106. *Brandeis Univ.*, 177 F. Supp. 3d at 606.

107. *Id.*

B. Notice

The DCL guidance contained no explicit requirement that students accused of sexual misconduct be notified of the charges against them.¹⁰⁸ The Proposed Rule requires notice of (1) the alleged violations of the college's code of conduct and (2) sufficient details regarding the allegations, including the identities of the parties involved, the date, time, and location of the alleged incident.¹⁰⁹ The Proposed Rule also requires schools to inform accused students of their right to request and inspect evidence.¹¹⁰ Further, it imposes on schools a continuing duty to supplement the initial notice with additional allegations the school later decides to investigate.¹¹¹

Although courts vary in their formulation of what notice is due in student misconduct proceedings, it is generally agreed that notice should sufficiently ensure the accused student a meaningful opportunity to be heard.¹¹² For notice to be meaningful, it must include some factual basis of the allegations.¹¹³ As the Supreme Court has recognized, the degree of formality required corresponds to the seriousness of the deprivation.¹¹⁴ The Fifth Circuit, for example, has held that when students face expulsion, notice "should contain a statement of the *specific* charges and grounds which, if proven, would justify expulsion."¹¹⁵

Both the initial notice requirement and the duty to supplement are necessary due process protections. Under *Matthews* balancing, the burden on the school to notify the accused of the charges when the

108. See generally Dear Colleague Letter, *supra* note 24 (excluding any requirement of notice to the alleged perpetrator); *Questions and Answers on Title IX and Sexual Violence*, *supra* note 25 (same).

109. *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, 83 Fed. Reg. 61,462, 61,474 (proposed Nov. 29, 2018) (to be codified at 34 C.F.R. pt. 106).

110. *Id.*

111. *Id.*

112. See, e.g., *Flaim v. Med. Coll. of Ohio*, 418 F.2d 629, 638 (6th Cir. 2005) (citation omitted) ("Notice satisfies due process if the student 'had sufficient notice of the charges against him and a meaningful opportunity to prepare for the hearing.'"); see also *Nash v. Auburn Univ.*, 812 F.3d 655, 661 (11th Cir. 1987) ("[Notice must be] reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.").

113. See, e.g., *Doe v. Univ. of So. Cal.*, 246 Cal. App. 4th 221, 244 (Cal. Ct. App. 2016).

114. See *Goss v. Lopez*, 419 U.S. 565, 584 (1975) ("[W]e have addressed ourselves solely to the short suspension, not exceeding 10 days. Longer suspensions or expulsions for the remainder of the school term, or permanently, may require more formal procedures.").

115. *Dixon v. Ala. State Bd. of Educ.*, 294 F.2d 150, 158 (5th Cir. 1961) (emphasis added).

school has that information is low.¹¹⁶ Further, the risk of erroneous outcome is high when one party—the school—has complete information, while the other party—the accused—lacks even the basic facts surrounding an investigation.¹¹⁷ In *Doe v. Brandeis University*, Brandeis failed to give notice to the student accused of sexual assault of the factual basis for the charge, despite his repeated requests.¹¹⁸ The school only gave him what the court described as a “vaguely worded [two-sentence] allegation.”¹¹⁹ Through the course of the investigation, he was “forced to speculate.”¹²⁰ Crucially, the decision maker found the victim to be more credible.¹²¹ The court found that lack of notice adversely affected the accused’s ability to respond to the allegations.¹²² The accused’s inconsistent recollection of events, according to the court, “is exactly what one would expect where one party is fully informed . . . and the other party remains ignorant.”¹²³

The duty to supplement is similarly necessary because it violates due process for a student to be punished for offenses of which he was unaware. Without notice of the charge, the student cannot mount a meaningful defense.¹²⁴ For example, the Eastern District of Virginia found a due process violation where an accused student was given notice of only one incident on one specific date, but was expelled in part based on incidents occurring on different dates.¹²⁵ At the hearing, the accused lacked notice of the charges against him and this insufficient notice was inexorably tied to the adequacy of his opportunity to be heard.¹²⁶ It is further unfair for an accused student to be punished for an offense of which he is unaware, based on testimony given or evidence presented to defend against a different offense.¹²⁷

116. See *Doe v. Rectors & Visitors of George Mason Univ.*, 149 F. Supp. 3d 602, 618 (E.D. Va. 2016) (noting that the school only notified the student of an incident occurring on one date but had knowledge of and expelled him based on different incidents that occurring on different dates).

117. See *Doe v. Brandeis Univ.*, 177 F. Supp. 3d 561, 603 (D. Mass. 2016) (noting how the respondent was unable to mount a defense).

118. *Id.* at 583.

119. *Id.*

120. *Id.* at 583, 603.

121. *Id.* at 603.

122. *Id.*

123. *Id.*

124. See, e.g., *Doe v. Rectors & Visitors of George Mason Univ.*, 149 F. Supp. 3d 602, 618 (E.D. Va. 2016).

125. *Id.* at 616–18.

126. *Id.* at 616–17.

127. See, e.g., *Doe v. Univ. of So. Cal.*, 246 Cal. App. 4th 221, 242 (Cal. App. 2016) (noting that “a disciplinary penalty based on testimony given while defending against a different charge

From the victim's perspective, however, the more detailed the notice, the greater the potential confidentiality concerns and risk of retaliation. A group of Attorneys General have suggested that requiring disclosure of the complainant's name and detailed factual allegations could result in leaks or be sent to third parties, and complainants might want to withhold their name or other confidential information.¹²⁸ However, to prepare a meaningful response, students facing disciplinary sanctions must know the name of the complainant.¹²⁹ The 2001 OCR guidance recognized this. It instructed that if a complainant requested his or her name be withheld, the accused student's response to the charges would be limited, and "OCR would not expect a disciplinary action against" the accused, but the school's response could include supportive measures for the complainant.¹³⁰ The Proposed Rule should include a confidentiality carve-out allowing complainants to withhold their name, provided that the accused student is not subject to disciplinary measures as a result. This enables the complainant to seek supportive measures, such as rescheduling classes or new living arrangements, while ensuring the scope of potential penalties respondents face is proportional. The Proposed Rule should also do more to address retaliation concerns.¹³¹ For example, the notice should specifically apprise both parties that retaliating against someone for complaining of sex discrimination is itself a form of sex discrimination, and barred under Title IX.¹³² These

smacks of unfairness" when a student being investigated for one charge was disciplined in part based on statements he gave related to another charge of which he was unaware); *cf. In re Ruffalo*, 390 U.S. 544, 551 (1968) ("These [attorney disbarment proceedings] are adversary proceedings of a quasi-criminal nature. The charge must be known before the proceedings commence. They become a trap when, after they are underway, the charges are amended on the basis of testimony of the accused. He can then be given no opportunity to expunge the earlier statements and start afresh.").

128. Attorneys General Comment Letter, *supra* note 81, at 38–39.

129. *See Dixon v. Ala. State Bd. of Educ.*, 294 F.2d 150, 159 (5th Cir. 1961) (holding that a student facing disciplinary measures should be given the name of the witnesses testifying against him and a report on the facts to which they will testify).

130. 2001 Guidance, *supra* note 22, at 17.

131. *See* ABA Criminal Justice Section Council, *ABA Criminal Justice Section Task Force on College Due Process Rights and Victim Protections: Recommendations for Colleges and Universities in Resolving Allegations of Campus Sexual Misconduct*, AM. BAR ASS'N 2 (June 2017), <https://www.americanbar.org/content/dam/aba/publications/criminaljustice/2017/ABA-Due-Process-Task-Force-Recommendations-and-Report.authcheckdam.pdf> (recommending that the Proposed Rule include provisions to prevent retaliation and to require communication of such provisions to the parties during the investigatory and adjudicatory processes).

132. *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 173–74 (2005); *see generally* Letter from Seth M. Galanter, Acting Assistant Sec'y for Civil Rights to Colleagues (Apr. 24, 2013), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201304.html#ftn3>.

modifications are necessary to protect victims from invasions of privacy and retaliation.

C. Accessing and Presenting Evidence

The Proposed Rule requires that parties have equal access to and opportunities to present evidence and witnesses.¹³³ While the DCL facially required equal rights in this respect,¹³⁴ it implicitly encouraged schools to treat complainants more favorably.¹³⁵ For example, after a respondent denied the allegations brought against him, Purdue University withheld all the evidence it used to adjudicate his case.¹³⁶ In a similar case, The University of Southern California refused to provide a respondent with the evidence the school had supporting the allegations unless the respondent “actively sought it through a written request.”¹³⁷ In both cases, the respective courts found due process violations.¹³⁸ The Proposed Rule appropriately specifies universities’ obligations with respect to gathering and presenting evidence.

The Supreme Court has held that the Due Process Clause “at least” requires that respondents in campus misconduct adjudications receive “an explanation of the evidence the authorities have and an opportunity to present his side of the story.”¹³⁹ Some courts have gone further. For example, the Fifth and Fourth Circuits support the following minimum procedures schools must afford students in disciplinary hearings: access to the names of witnesses and some information on the facts to which they will testify, the opportunity to

133. *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, 83 Fed. Reg. 61,462, 61,498 (proposed Nov. 29, 2018) (to be codified at 34 C.F.R. pt. 106) (“Provide equal opportunity for the parties to present witnesses and other inculpatory and exculpatory evidence Provide both parties an equal opportunity to inspect and review any evidence obtained as part of the investigation that is directly related to the allegations raised in a formal complaint, including the evidence upon which the recipient does not intend to rely in reaching a determination regarding responsibility, so that each party can meaningfully respond to the evidence prior to conclusion of the investigation Create an investigative report [and] . . . provide a copy of the report to the parties for their review and written response”).

134. See Dear Colleague Letter, *supra* note 24, at 11(emphasis added) (“[P]arties must have an equal opportunity to present relevant witnesses and other evidence.”).

135. Elizabeth Bartholet, et al., *Fairness for All Students Under Title IX*, HARV. UNIV. DASH REPOSITORY 2 (Aug. 21, 2017), <https://dash.harvard.edu/bitstream/handle/1/33789434/Fairness%20for%20All%20Students.pdf> (“Though OCR did not require schools to treat accused students unfairly in the investigation and adjudication process, its tactics put pressure on them to stack the system so as to favor the alleged victims.”).

136. *Doe v. Purdue Univ.*, 928 F.3d 652, 663 (7th Cir. 2019).

137. *Doe v. Univ. of So. Cal.*, 246 Cal. App. 4th 221, 248 (Cal. App. 2016).

138. *Purdue Univ.*, 928 F.3d at 663; *Univ. of So. Cal.*, 246 Cal. App. 4th at 246.

139. *Goss v. Lopez*, 419 U.S. 565, 581 (1975).

defend the charges either orally or through written affidavits of witnesses, and access to a report of the decision maker's findings.¹⁴⁰ The Seventh Circuit has held that "withholding the evidence on which [the school] relied in adjudicating . . . guilt [is] itself sufficient to render the process fundamentally unfair."¹⁴¹

Under the DCL guidance, schools also treated complainants and respondents dissimilarly with respect to which witnesses they interviewed, what evidence they investigated, and what materials they provided to the parties. Brandeis University, for example, refused to provide the respondent with a copy of the investigatory report on which he was found responsible until after both his adjudication and appeal ended.¹⁴² Columbia University refused to interview any of the witnesses the respondent identified, while interviewing at least one of complainant's witnesses.¹⁴³ The University of Southern California gave only the complainant copies of the investigatory notes taken on each witness.¹⁴⁴ These examples are inconsistent with due process. Failure to investigate impeachment evidence when it is brought to the school's attention can be "fundamentally unfair" to the party raising that evidence.¹⁴⁵ Sexual assault cases often hinge on credibility, and thus impeachment evidence may be particularly important with respect to due process.¹⁴⁶ Moreover, the Second Circuit found that declining to interview witnesses the respondent identified as having favorable information contributed to a plausible allegation of gender bias under Title IX.¹⁴⁷

The Proposed Rule also broadens the scope of the investigatory evidence parties can obtain. This change is generally positive but lacks necessary carve-outs. The Proposed Rule enables both parties to access evidence obtained during the investigation that "is directly related to the allegations raised in the formal complaint"¹⁴⁸ as opposed to

140. *Dixon v. Ala. State Bd. of Educ.*, 294 F.2d 150, 159 (5th Cir. 1961); *see also Henson v. Honor Comm. of Univ. of Va.*, 719 F.2d 69, 74 (4th Cir. 1983) (supporting the application of the "minimum due process requirements for disciplinary hearings" as summarized by *Dixon*).

141. *Purdue Univ.*, 928 F.3d at 663.

142. *Doe v. Brandeis Univ.*, 177 F. Supp. 3d 561, 585 (D. Mass. 2016).

143. *Doe v. Columbia Univ.*, 831 F.3d 46, 56 n.10 (2d Cir. 2016).

144. *Doe v. Univ. of So. Cal.*, 246 Cal. App. 4th 221, 244 (Cal. App. 2016).

145. *Purdue Univ.*, 928 F.3d at 664.

146. *See infra* note 160 and accompanying text.

147. *Columbia Univ.*, 831 F.3d at 56.

148. *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, 83 Fed. Reg. 61,462, 61,475 (proposed Nov. 29, 2018) (to be codified at 34 C.F.R. pt. 106).

“information that will be used at the hearing[.]” which the DCL required.¹⁴⁹ Some have argued that the broader language in the Proposed Rule invites parties to seek irrelevant or confidential information. However, limiting disclosure to information used at the hearing is problematic because relevance has been used to exclude evidence potentially favorable to the accused, including impeachment evidence. Schools have used lack of relevance to avoid investigating impeachment or otherwise favorable evidence proposed by the respondent. For example, Columbia University declined to interview the respondent’s witnesses because the decision maker claimed it was irrelevant.¹⁵⁰ Similarly, Washington and Lee University declined to interview some of the respondent’s witnesses, claiming that they already had the facts they needed.¹⁵¹ Including a broad exception for irrelevance could enable schools to selectively investigate under the guise of relevance or lack of necessity. However, the Proposed Rule should allow for redaction of sensitive information, such as medical information, and should protect information covered under privileges such as attorney-client and physician-patient.¹⁵² These exceptions would protect complainants’ conversations with medical professionals, and reduce the risk of unnecessary disclosure of sensitive information.

D. Cross-Examination at a Live Hearing

The Proposed Rule requires cross-examination at a live hearing.¹⁵³ Instead of traditional cross-examination, the Proposed Rule should utilize a third-party questioner model of cross-examination. This model can achieve the primary benefit of cross-examination—assessing credibility—in a manner that is less adversarial and better suited to the educational context in which the adjudications take place. Further, carve-outs are necessary for specific situations in which any form of cross-examination would have little probative value.

The requirement of cross-examination represents a sharp departure from the DCL, and is one of the most contentious aspects of the Proposed Rule.¹⁵⁴ The Proposed Rule also bars questions about the

149. Dear Colleague Letter, *supra* note 24, at 11.

150. *Columbia Univ.*, 831 F.3d at n.10.

151. *Doe v. Wash. and Lee Univ.*, No. 6: 14-CV-00052, 2015 WL 4647996, at *4 (Aug. 5, 2015).

152. See ACLU Comment Letter, *supra* note 80, at 30; Attorneys General Comment Letter, *supra* note 81, at 42–43.

153. *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, 83 Fed. Reg. at 61,474.

154. E.g., Suzanne B. Goldberg, *Keep Cross-Examination Out Of College Sexual-Assault*

complainant's sexual history unless the evidence is offered to prove someone other than the respondent committed the offense or to prove consent,¹⁵⁵ otherwise known as a "rape shield."¹⁵⁶ Either party can request that the cross-examination occur with the parties in separate rooms using live-stream technology to allow the decision maker to view the testimony in real-time.¹⁵⁷ The Proposed Rule also prohibits respondents from conducting cross-examination themselves; rather, the respondent's advisor or a school-appointed advisor must do so.¹⁵⁸ The DCL did not require live hearings and strongly discouraged cross-examination.¹⁵⁹

The Supreme Court has never ruled on what due process requires with respect to cross-examination in post-secondary disciplinary procedures. In other contexts, it has declared that "cross-examination has always been considered a most effective way to ascertain truth,"¹⁶⁰ and crucially allows for the assessment of demeanor and credibility.¹⁶¹ Circuit courts have noted that cross-examination is "most critical when the issue is the credibility of the accuser."¹⁶² Credibility disputes are paradigmatic of sexual misconduct cases. Most student-on-student sexual misconduct issues amount to a he-said-she-said dispute: the parties assert competing claims supported by little, if any, corroborating evidence, and the decision maker must determine which account is more credible.¹⁶³ Some courts have thus held that in campus sexual misconduct cases where credibility is at issue, due process requires a hearing with cross-examination.¹⁶⁴ Further, the Sixth Circuit deemed

Cases, CHRON. OF HIGHER EDUC. (Jan. 10 2019), <https://www.chronicle.com/article/Keep-Cross-Examination-Out-of/245448>.

155. *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, 83 Fed. Reg. at 61,475.

156. Press Release, U.S. Dep't of Educ., Secretary DeVos: Proposed Title IX Rule Provides Clarity for Schools, Support for Survivors, and Due Process Rights for All (Nov. 16, 2018), <https://www.ed.gov/news/press-releases/secretary-devos-proposed-title-ix-rule-provides-clarity-schools-support-survivors-and-due-process-rights-all>.

157. *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, 83 Fed. Reg. at 61,475.

158. *Id.* at 61,474–75.

159. Dear Colleague Letter, *supra* note 24, at 11–12.

160. *Watkins v. Sowders*, 449 U.S. 341, 349 (1981).

161. *Maryland v. Craig*, 497 U.S. 836, 846 (1990).

162. *Doe v. Univ. of Cincinnati*, 872 F.3d 393, 401 (6th Cir. 2017) (quoting *Doe v. Brandeis* 177 F. Supp. 3d 561, 605 (D. Mass. 2016)).

163. ACLU Comment Letter, *supra* note 80, at 25.

164. *Haidak v. Univ. of Mass.-Amherst*, 933 F.3d. 56, 69 (1st Cir. 2019); *Doe v. Baum*, 903 F.3d 575, 581 (6th Cir. 2018).

live questioning necessary and written statements insufficient because adversarial questioning is essential to assessing credibility.¹⁶⁵

Although cross-examination renders hearing outcomes more reliable,¹⁶⁶ administering traditional cross-examination in all sexual misconduct adjudications imposes potentially massive administrative and financial burdens on universities, and also risks re-traumatizing complainants. Schools simply lack the resources to appropriately administer the type of cross-examination envisioned by the Proposed Rule. No matter how well-intentioned, the staff typically overseeing disciplinary hearings are not judges or mediators and generally lack legal training.¹⁶⁷ The costs of retaining appropriate staff or training existing staff could be prohibitive,¹⁶⁸ especially since the Proposed Rule requires schools to appoint advisors for students upon request.¹⁶⁹ The American Council on Education has argued that “highly legalistic, court-like processes” are at odds with school’s core “educational missions.”¹⁷⁰ Schools also have a strong interest in encouraging students to report sexual misconduct and avoid the infliction of additional, unnecessary harm to those that come forward.¹⁷¹ Mandatory cross-examination could frustrate those interests. Undergoing cross-examination by an advisor of the respondent’s choice potentially subjects the complainant to traumatization and other negative effects linked to cross-examination.¹⁷² The prospect of being cross-examined at a live hearing might also discourage students, both complainants and witnesses, from participating.¹⁷³ Also, the decision maker is barred from

165. *Baum*, 903 F.3d at 582–83.

166. *E.g.*, *Univ. of Cincinnati*, 872 F.3d at 402.

167. International Association of Campus Law Enforcement Administrators, Comment Letter on Proposed Rule “Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance” 8 (Jan. 28, 2019), https://www.iaclea.org/assets/uploads/pdfs/Title_IX_IACLEA_Response_Comments.pdf.

168. *Id.*

169. *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, 83 Fed. Reg. at 61,462, 61,474–75 (proposed Nov. 29, 2018) (to be codified at 34 C.F.R. pt. 106).

170. American Council on Education, on Proposed Rule “Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance” 8 (Jan. 20, 2019), <https://www.acenet.edu/Documents/Comments-to-Education-Department-on-Proposed-Rule-Amending-Title-IX-Regulations.pdf>.

171. *Doe v. Baum*, 903 F.3d 575, 583 (6th Cir. 2018).

172. See NCVBA Comment Letter, *supra* note 84, at 12–13 (noting that the respondent’s advisor of choice will often be an attorney who “is prepared to grill the survivor about the traumatic details of the assault, or possibly an angry parent or a close friend” and the “adversarial and contentious nature of cross-examination risks further unnecessary trauma . . .”).

173. *E.g.*, *id.* at 13.

considering any out-of-hearing statements made by parties or witnesses who refuse to submit to cross-examination.¹⁷⁴ Thus, if parties do not submit to cross-examination, critical evidence might be barred from consideration.

However, a balance can be struck to achieve the primary benefit of assessing credibility within the administrative capabilities of most schools while also reducing the risk of further harm to victims. Many schools have adopted, and courts have upheld as constitutionally sound, a process by which a third-party questioner facilitates an adversarial exchange using questions submitted by both parties.¹⁷⁵ A hearing panel or decision maker ultimately decides which questions to ask and poses the questions. The parties can be located in different rooms, and the third-party poses questions each side proposed to ask the other, allowing the decision maker to assess the demeanor and truthfulness of responses. Through the “iterative process” of questioning, the complainant is informed by the answers given by the respondent in real time, and vice versa.¹⁷⁶ In upholding a similar process, the First Circuit noted that traditional cross-examination would not “increase the probative value of hearings or decrease the risk of erroneous deprivation of due process.”¹⁷⁷ The Seventh Circuit upheld a version of this approach even where the parties were barred from submitting follow-up questions.¹⁷⁸ Many schools currently utilize a version of this method,¹⁷⁹ and a group of Democratic Attorneys General supports its implementation.¹⁸⁰

Moreover, irrespective of the format, live cross-examination may not be necessary in all sexual misconduct cases. Although most cases turn on testimonial evidence, not all do. For example, where video and

174. *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, 83 Fed. Reg. at 61,475.

175. *E.g.*, *Assessing Betsy DeVos’s Proposed Rules on Title IX and Sexual Assault*, NEW YORKER (Feb. 1, 2019), <https://www.newyorker.com/news/our-columnists/assessing-betsy-devos-proposed-rules-on-title-ix-and-sexual-assault>.

176. *Haidak v. Univ. of Mass.-Amherst*, 933 F.3d 56, 70 (1st Cir. 2019) (upholding the constitutionality of having a neutral board pose questions submitted by both sides, alternating between the two sides, and examining each side three times, because the hearing was “reasonably calculated to get at the truth” and “reasonably calculated to expose any relevant flaws” in the complainant’s account).

177. *Id.* (quoting *Matthews v. Eldridge*, 424 U.S. 319, 335 (1976)) (quotation marks omitted).

178. *Doe v. Cummins*, 662 F. App’x. 437, 448 (6th Cir. 2016).

179. *E.g.*, *Assessing Betsy DeVos’s Proposed Rules on Title IX and Sexual Assault*, NEW YORKER (Feb. 1, 2019), <https://www.newyorker.com/news/our-columnists/assessing-betsy-devos-proposed-rules-on-title-ix-and-sexual-assault> (noting that Harvard uses a version of this method).

180. Attorneys General Comment Letter, *supra* note 81, at 41.

photo evidence of the alleged sexual assault served as the primary evidence and the complainant's credibility was not at issue, the Fifth Circuit found that limiting cross-examination to written questions did not violate the accused's due process.¹⁸¹ Further, when a respondent admits to the allegations, cross-examination may be wholly unnecessary: a confession eliminates the need to evaluate the demeanor or memory of the complainant or witness.¹⁸² Live cross-examination in these two circumstances would have little to no probative value and impose undue burdens on schools and complainants. The Supreme Court has described the application of due process as an "intensely practical matter" and has also noted that "[the] very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation."¹⁸³ As such, the Proposed Rule should exempt from live cross-examination cases involving confessions and video evidence, or at least provide a mechanism by which parties can petition the decision maker for exemptions based on the circumstances.

E. Burden of Proof

The burden of proof required for sexual misconduct adjudications represents another controversial change. The DCL prescribed the preponderance of the evidence standard,¹⁸⁴ while the Proposed Rule allows schools to choose between preponderance of the evidence or the higher standard of clear and convincing.¹⁸⁵ If schools choose preponderance of the evidence for sexual-related violations, they must uniformly apply that standard to non-sexual violations carrying the same maximum sanction.¹⁸⁶ Ultimately, the higher burden of proof is unnecessary if schools comply with the other procedural protections in the Proposed Rule.

181. *Plummer v. Univ. of Houston*, 860 F.3d 767, 775–76 (5th Cir. 2017).

182. *See Flaim v. Med. Coll. of Ohio*, 418 F.3d 629, 641 (5th Cir. 2005) (holding that a plaintiff who admitted to a felony drug offense was not denied due process when his school disallowed him from cross-examining his arresting officer during his disciplinary hearing, and subsequently expelled him).

183. *Goss v. Lopez*, 419 U.S. 565, 578 (1975) (quoting *Cafeteria Workers v. McElroy*, 367 U.S. 886, 895 (1961)) (second alteration in original).

184. Dear Colleague Letter, *supra* note 24, at 10–11.

185. *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, 83 Fed. Reg. 61,462, 61,477 (proposed Nov. 29, 2018) (to be codified at 34 C.F.R. pt. 106).

186. *Id.*

Proponents of preponderance of the evidence lean on the nature of Title IX. For one, Title IX is a civil rights statute and preponderance of the evidence is used in civil rights litigation, including other suits under Title IX.¹⁸⁷ This standard is more consistent with the “equitable” procedures required under current DOE regulations implementing Title IX.¹⁸⁸ OCR itself uses preponderance of the evidence when it resolves issues of discrimination under Title IX.¹⁸⁹ It also makes logical sense to treat parties equitably “where there is no ex ante reason to favor one side over the other.”¹⁹⁰ These adjudications are also not criminal proceedings and students never face incarceration, which also supports the lack of necessity for a heightened standard.

Conversely, proponents of the clear and convincing standard focus on the nature of the proceedings at issue. The Supreme Court has held that the preponderance of the evidence standard is appropriate in a “typical civil case involving a monetary dispute between private parties;” whereas, clear and convincing can be used in civil cases involving “allegations of fraud or some other quasi-criminal wrongdoing by the defendant” where the interests at stake are more substantial than money.¹⁹¹ The Court has further recognized that clear and convincing may be especially beneficial when someone’s reputation is at stake, and it has used this higher standard “to protect particularly important individual interests in various civil cases.”¹⁹² Moreover, parties in civil rights litigation are afforded a vast array of procedural protections not available to respondents in campus misconduct proceedings, such as the Federal Rules of Civil Procedure and live hearings over which a judge presides.¹⁹³

Respondents in sexual misconduct adjudications have a compelling interest in safeguarding their reputation, especially in light of the collateral consequences that accompany a finding of responsibility. The Supreme Court has noted that due process is implicated when “a person’s good name, reputation, honor, or integrity” is in question.¹⁹⁴ Disclosure of sexual misconduct could foreclose further educational or

187. See ACLU Comment Letter, *supra* note 80, at 22.

188. 34 C.F.R. § 106.8 (2018).

189. U.S. DEP’T OF EDUC., CASE PROCESSING MANUAL, ART. III, § 303 (effective Nov. 19, 2018), <https://www2.ed.gov/about/offices/list/ocr/docs/ocrcpm.pdf>.

190. See ACLU Comment Letter, *supra* note 80, at 21.

191. *Addington v. Texas*, 441 U.S. 418, 424 (1979).

192. *Id.*

193. See *supra* note 82 and accompanying text.

194. *Wisconsin v. Constantineau*, 400 U.S. 433, 437 (1971).

employment opportunities.¹⁹⁵ For example, the respondent in *Doe v. Brandeis* had a permanent notation of “serious sexual transgressions” on his educational record.¹⁹⁶ Reputational injuries in campus sexual misconduct cases are comparable to those that follow a criminal conviction for similar conduct, and the stigma associated with sex offenses could be unduly harsh for someone who was never criminally convicted.¹⁹⁷ A finding of responsibility can be life-altering.

Schools also have a strong interest in maintaining safe and productive learning environments, which includes supporting victims and ensuring all students perceive the process as fair. A higher standard of proof, especially coupled with the presumption of non-responsibility, could be interpreted as swinging the pendulum in the opposite direction of the DCL suggesting favoritism toward the accused. Avoiding even the appearance of bias is in the school’s best interest. Further, allowing schools to use the “clear and convincing” standard for sexual misconduct and the preponderance of the evidence standard for other types of misconduct suggests that complainants in sexual misconduct should be viewed with enhanced scrutiny. This may perpetuate harmful stereotypes about rape and sexual assault victims, namely that they should not be trusted.¹⁹⁸ In fact, research suggests that false accusations are rare.¹⁹⁹

Ultimately, respondents have a particularly compelling private interest, but the probative value of the higher standard is likely minimal, given the other procedural protections in place under the Proposed Rule. Courts have been particularly critical of schools’ utilization of preponderance of the evidence when other key procedural protections were lacking. For example, the court in *Brandeis University* noted that the lower standard was concerning in light of the school’s deliberate elimination of other procedural protections.²⁰⁰ Former federal judge Nancy Gertner has also described Harvard’s regime as “the worst of both worlds, the lowest standard of proof,

195. *E.g.*, *Goss v. Lopez*, 419 U.S. 565, 575 (1975); *Doe v. Brandeis*, 177 F. Supp. 3d 561, 601–02 (D. Mass. 2016).

196. *Brandeis*, 177 F. Supp. at 571.

197. *Id.* at 601–02.

198. NCVBA Comment Letter, *supra* note 84, at 14–15.

199. David Listak et. al., *False Allegations of Sexual Assault: An Analysis of Ten Years of Reported Cases*, 16 VIOLENCE AGAINST WOMEN 1318, 1318 (2010), <https://journals.sagepub.com/doi/10.1177/1077801210387747> (finding a prevalence rate of false accusations of sexual assault to be between two and ten percent).

200. *Brandeis Univ.*, 177 F. Supp. 3d at 607.

coupled with the least protective procedures.”²⁰¹ Preponderance of the evidence should suffice, provided that schools comply with other previously-discussed aspects of the Proposed Rule.

CONCLUSION

The procedural protections afforded by the Proposed Rule are well calculated to reduce the erroneous findings of responsibility perpetuated by the DCL. Basic due process rights must be afforded before punishment is imposed, and courts are increasingly finding sufficiently pleaded allegations of due process violations in campus sexual assault adjudications. Ultimately, an equitable process benefits both the respondents and the complainants, who have an interest not only in avoiding challenges to their own adjudications but also in the public perception of campus sexual assault and its victims. As Judge Nancy Gertner has stated, “[i]t takes only a few celebrated false accusations of rape to turn the clock back.”²⁰²

201. Nancy Gertner, *Sex, Lies and Justice*, AM. PROSPECT (Jan. 12, 2015), <https://prospect.org/justice/sex-lies-justice/>.

202. *Id.*